No. 1887 Misc.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

LAWRENCE BRAICO and RONALD ROUTA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AND ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI

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The Solicitor General, by way of opposition to granting of certiorari, raises essentially two arguments:

1. That, as pointed out by the court below, the proof was "unusually clear" and that therefore misjoinder with co-defendant DeMaio* did not prejudice petitioners Braico and Routa; and

2. Failure to grant petitioner Routa a hearing, which the Solicitor General concedes should have been granted, is not grounds for reversal because (a) Agent Miller's testimony that Routa knew Braico and DeMaio added no weight to the proof of the substantive count, and (b) since Routa was clearly warned of his rights, failure to hold a hearing was not prejudicial.

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* DeMaio has, since the filing of the petition by petitioners Braico and Routa, similarly filed a petition for certiorari on April 27, 1970. Petitioners Braico and Routa respectfully request leave to adopt in so far as applicable the arguments advanced by petitioner DeMaio.

ARGUMENT

1. The Evidence Was Not Unusually Clear And Petitioners Were Prejudiced By Misjoinder.

The conclusion of the Court of Appeals that the proof of guilt was "unusually clear" is totally refuted in a reading of the record. The entire case against petitioners was developed through the thoroughly discredited and unreliable testimony of two bias-motivated thieves serving long prison sentences. Moreover, both Fernandez and Garland told different stories to the agents which totally contradicted their trial testimony. Cross-examination of Fernandez and Garland and comparison with their testimony with that of the other witnesses show that the evidence was by no means unusually clear or overwhelming and that " . . . the scales of justice . . . [were] delicately poised between guilt and innocence." (*Glasser* v. *United States*, 315 U.S. 60, 67). A few examples will suffice:

(a) The witness Fernandez first told F.B.I. Agents that he sold all of the jewelry to Braico. He did not mention petitioner Routa nor for that matter co-defendant DeMaio. (Tr. 121-22) He later changed his story to the story he told at the trial.

(b) Both Fernandez and Garland, who were both lodged in the DuPage County Jail, consistently and repeatedly told Agents and the prosecutor that the payoff from Braico and Routa occurred in the apartment on Cicero. (Tr. 160-62, 470,75, 540-42) No less than one month prior to trial, Garland, for reasons peculiarly known only to the government (perhaps they did not believe him) was brought before the grand jury (not however the grand jury which returned the indictment) to tell his story again. He swore that the money from Braico and Routa was received in the apartment. (Tr. 47-75)

At the trial they told a completely different story—relating that the money was passed in Buddy's Lounge where the witness Violet DeRegno, who was Fernandez' girlfriend, was conveniently present to corroborate their story. (Tr. 457-67, 366-73)

(c) On the night of August 3, 1967, Fernandez and Garland, driving a stolen car, which had been provided by one Frank Grudinski who was a co-defendant with Garland in a pending armed robbery charge (Tr. 482-84), with the jewelry in the trunk were stopped for a traffic violation. Garland was ticketed for driving with a fictitious license under the name of Joseph Richman. Fernandez was told to follow in the stolen car to the police station but "took off." (Tr. 87) Asked why the police did not search the trunk, Fernandez and Garland testified (incredibly) that no search was conducted by the Chicago policeman because Garland told him that he could not search the trunk without a warrant! (Tr. 256-57, 488-93)

Upon examination of the prosecutor's notes, however, a different picture began to emerge. During an interview with Fernandez, the prosecutor had assumed from his interview with Fernandez that there had been an attempted bribe and written with reference to the incident, "tried to bribe him." (Tr. 820-21) It was stipulated that the prosecutor, if called to testify, would testify that he interpreted what Fernandez said and did to indicate that Garland had offered the policeman a bribe while they were both standing by the trunk. (Tr. 820-21) The policeman who issued the ticket admitted that a bribe was offered, but denied that he accepted it. (He also said that he believed that he had checked to see if the car was stolen. (Tr. 645-660)) Ferdinand and Garland denied that a bribe was offered and Fernandez denied that he told the prosecutor about the bribe attempt. (Tr. 252-57)

(d) Their trial testimony as to how much they had received from co-defendant DeMaio on the night they allegedly met him at his house and how much they received the following day also contradicted previous accounts. Previously they told agents and the prosecutor that they received $600.00 on the night of August 3, 1967, and $1600 the following day. At the trial (perhaps to explain payments totalling $600 by Garland to his ex-wife, mother and a lawyer, not to mention the denied bribe), the amounts were reversed. (Tr. 82-83, 90-91, 231-32, 407-14, 560-65)

(e) After the arrest of Garland, Fernandez took the jewelry to the home of one Johnny Smego, who was a government witness but whose testimony contradicted that of Fernandez and Garland in many important respects. (Smego, for example, denied that he was told that they had stolen jewelry.) (Tr. 88-90, 245-49, 306-320, 421-23)

In short, can it really be said that the only evidence of guilt, which was the testimony of two thieves who admitted to numerous lies to agents, the prosecutor, and the grand jury, was unusually clear? The jury might well have had reason to wonder whether the jewelry was really sold to Braico and Routa and DeMaio or whether it was sold to Grudinski and Smego (or someone else). It is not here contended that the evidence, if believed and viewed as it must be in a light most favorable to the government, was insufficient to sustain the conviction. It is however suggested that it was barely sufficient and that the slightest degree of prejudice resulting from misjoinder may have tipped the scales against petitioners.

The Solicitor General suggests that it was not said why Braico was at the jail. Can there be any doubt? Is it suggested that it was the duty of defense counsel to pursue this subject further?

Curiously, the Solicitor General also observes that there could be no prejudice resulting from the statement that co-defendant DeMaio was associated with the syndicate because petitioners were bidding against DeMaio for the goods. This overlooks the thrust of petitioners' argument that prejudice resulted from joinder (*i.e., association*) with DeMaio in the unproven charge of conspiracy. Necessarily, as the jury found all defendants guilty of conspiracy, it must have concluded that all three were somehow associated.

2. Braico Was Prejudiced By Failure To Hold A Voir Dire Hearing On Admissibility Of His Post-Arrest Statements.

Conceding that Braico should have been giving a hearing, the Solicitor General argues that his admissions added nothing of weight to the evidence on the substantive count and that, as he was adequately warned of his rights, failure to hold a hearing was not prejudicial error. This argument conveniently overlooks the fact that he refused to sign the waiver of rights form and therefore he *never waived his rights* and that this fact — failure to waive rights — when presented to the jury is prejudicial and reversible error. (*Miranda* v. *Arizona,* 384 U.S. 436, 468, footnote 37) In the instant case, over objection, the unsigned waiver of rights form (exhibit 56) was admitted in evidence and sent to the jury. (Tr. 723) As the government observed in a factual context indistinguishable from the present and arising in the same Circuit Court of Appeals:

> " . . . in *Nielsen* the trial court allowed the *unsigned* waiver of rights form to be read into evidence which itself amounted to reversible error." (emphasis the government's) Brief for Appellee in *United States* v. *Brian Foy,* 7th Cir. No. 16996, p. 14.

Accordingly, by the government's own admission, reversible error as to Routa was committed.

The Solicitor General's observation that Routa's admission that he knew DeMaio and Braico added no weight to the substantive count is erroneous, as Braico was named as a co-defendant in the same count with Routa. Most importantly, however, his admission that he knew DeMaio, viewed as it must be in connection with the testimony that DeMaio was "associated with the syndicate", adds to the prejudice resulting from misjoinder of defendants and contradicts the government's argument that there was no prejudice because DeMaio and Braico and Routa were bidding against each other.

CONCLUSION

It is respectfully submitted that each of the errors raised, while they might not under some circumstances be grounds for reversal, should not, in the posture of this case, be disregarded " . . . since there is a real chance that [they] might have provided the slight impetus which swung the scales toward guilt." (*Glasser* v. *United States*, 315 U.S. 60, 67).

Respectfully submitted,

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